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No. [redacted] 30

In the

Supreme Court of the United States

OCTOBER TERM, 1937.

THE COLORADO NATIONAL BANK OF DENVER and [illegible] HENDRIE GRANT, Executors of the Estate of Edwin [illegible] Hendrie, Deceased, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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CLARK QUICK-PRINTING CO., LAWRENCE [illegible], DENVER, COLO.

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In the

Supreme Court of the United States

October Term, 1937.

No.....................

The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners,

v.

Commissioner of Internal Revenue.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, petitioners, respectfully pray for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered January 31, 1938 (R. p. 60). Rehearing denied April 4, 1938 (R. p. 97).

QUESTIONS PRESENTED.

1. Whether the decedent's irrevocable transfer, effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

2. Whether an irrevocable gift in trust (without reservation of income to donor), the actual use of which is

intended to be withheld from the beneficiaries until after donor's death, is, because of such provision, as a matter of law in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

3. Whether a trust for the purpose of preserving property from loss in the stock market is testamentary and taxable as in contemplation of death because of an ultimate intent to provide by the trust for donor's descendants after his death.

4. Whether the determination by the Board of Tax Appeals that the gift is not in contemplation of death, based on the undisputed evidentiary facts of good health, commendable motive to save property from loss, anticipation of future business activity, lack of thought of death immediately or in the near future, and continued life for more than five years, can be overturned by the Circuit Court of Appeals because it draws an opposite inference from the same evidentiary facts.

5. Whether there was substantial evidence to sustain the determination of the Board.

STATEMENT.

Five and one-half years before his death, Edwin B. Hendrie created on January 7, 1927, an irrevocable trust (Exhibit B, R. p. 10) of approximately $827,000.00, the income to accumulate and to be added to the principal during his life, and on his death the income to be paid to his daughter with remainder over to her children. He died on July 15, 1932, at the age of eighty-five years and six months (R. p. 35).

Petitioners are executors of his estate and on the Federal Estate Tax Return reported a gross estate of $938,006.68 (R. p. 36). The trust assets were not included. The Commissioner of Internal Revenue in a deficiency notice, September 13, 1934, added the amount of $1,034,074.22,

representing the value at Mr. Hendrie's death of the property transferred to the trust (R. p. 37) and asserted a deficiency tax in the amount of $188,108.28 (R. p. 36).

Petitioners appealed to the Board of Tax Appeals, December 8, 1934 (R. p. 3) and in a stipulation of facts filed May 19, 1936, all of the foregoing facts were stipulated. In addition all of the evidence was stipulated and was undisputed (R. p. 35).

The undisputed testimony of decedent's physician (R. p. 40), his son-in-law (R. p. 46) and his lawyer (R. pp. 42-44) was to the effect that decedent until shortly before his death and at and long after the execution of the trust was in good health, had had no serious illness, was without symptom of disease (R. pp. 40-41), was active in business, exercised regularly, taking setting-up exercises and walks, played golf, took annual trips alone to California and at the time of the execution of the trust was contemplating speculation in the stock market and thereafter did so speculate on a considerable scale (R. p. 46). The reason he gave to the trust officer for the creation of the trust was "that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations" (R. p. 43). At his death the value of the trust was greater than the value of his estate.

There was no discussion of avoidance of death or inheritance taxes or of the disposition of the balance of his estate, nor is there anywhere in the record any evidence of a desire to avoid the estate tax or any discussion of it (R. p. 44). His will (R. pp. 47-50) had been drawn some two years before the creation of the trust. "The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until

after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death." (From Opinion of Board of Tax Appeals, R. p. 30.)

STATUTE INVOLVED.

The statute involved is set out in the Appendix (infra p. 28).

RULING OF THE BOARD OF TAX APPEALS AND OF THE COURT BELOW.

The Board of Tax Appeals, in a memorandum opinion entered September 19, 1936, not reported but appearing (R. pp. 28-30), found for the taxpayer (petitioners), holding the gift was not in contemplation of death. It said (R. pp. 29-30):

> "* * * Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon Shukert v. Allen, 273 U. S. 545; McCormick v. Burnet, 283 U. S. 784; St. Louis Union Trust Co. v. Becker, 76 F. (2d) 851, affirmed 296 U. S. 48; Reinecke v. Northern Trust Co., 278 U. S. 339; Klein v. United States, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells,

283 U. S. 102. Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners."

The Circuit Court of Appeals (Judge Lewis dissenting) eversed the Board (R. pp. 53-60), 95 F. (2d) 160 (Advance heets). It held that (R. p. 58) "The trust was not designed o make provision for the beneficiaries during his life. None f the property or the increment thereto was to reach them ntil after his death * * *. The dominant purpose was to nake provision for his descendants after his death, in the vent his speculations proved tragic. It was to place that ubstantial amount of property in an asylum of immunity rom adverse consequences of speculation, in order to make ertain that it would be used for his daughter and her chilren after his death." The Court found "The purpose was commendable one," but that such a transfer is associated ith death, is testamentary in character, and as a matter of w is in contemplation of death "though decedent was in ound health of mind and body and did not entertain thought f death immediately or in the near future" (R. p. 59). It eld, therefore, that there was no substantial evidence to ipport the finding of the Board (R. p. 59).

Petition for rehearing was filed on March 1, 1938, and nied on April 4, 1938.

REASONS FOR GRANTING WRIT.

1. The Circuit Court of Appeals has held that an irvocable gift in trust without reservation of income to the nor is as a matter of law in contemplation of death within meaning of Section 302 (c) of the Revenue Act of 1926 ause it provides for an accumulation of the income until er donor's death, thus preventing the beneficiaries from eiving it until that time. The intent to withhold the

use of the income is held to manifest an intent to provide for the beneficiaries after donor's death and to be therefore testamentary and equivalent to contemplation of death regardless of other factors.

This is in conflict with numerous decisions of this Court and of the Circuit Court of Appeals wherein it has been held that the postponement by trust instrument of the beneficiary's use and enjoyment until after donor's death does not make the gift taxable under the statute: *Shukert v. Allen,* 273 U. S. 545; *Reinecke v. Northern Trust Co.,* 278 U. S. 339; *May v. Heiner,* 281 U. S. 238; *Becker v. St. Louis Union Trust Co.,* 296 U. S. 48; *Commissioner of Internal Revenue v. McCormick,* 43 F. (2d) 277; *Welch v. Hassett,* 90 F. (2d) 833 (Circuit Court of Appeals, First Circuit), affirmed in Supreme Court on a different point, February 28, 1938.

2. The Circuit Court of Appeals held that though the immediate purpose of the trust was the preservation of a part of donor's property from the danger of stock market speculations in which he was engaged, yet he desired to preserve it in order to be certain that his daughter and her children would be provided for after his death, and that his motive was therefore testamentary and in contemplation of death. This it held to be true, though he was in sound health of mind and body and did not entertain thought of death immediately or in the near future and though it found his purpose was commendable. There was no evidence or finding of any intent to evade taxes.

This is in conflict with and contrary to the decision of *United States v. Wells,* 283 U. S. 102, and *Commissioner of Internal Revenue v. McCormick et. al.,* 43 F. (2d) 277 (Circuit Court of Appeals, Seventh Circuit). (Reversed in United States Supreme Court (283 U. S. 783) on the ground that the gift was not taxable under the possession and enjoyment clause. The Court of Appeals had held it taxable under that clause though not under the contemplation of

clause.) In those cases the distinction is drawn be- "contemplation of death" and the general expecta- f death common to all, and it is held that the words "in mplation of death" mean that the thought of death is npelling cause of the transfer, and that if the motive accomplish some purpose desirable to him if he con- to live, it is not within the meaning of the statute.

. The Circuit Court of Appeals has overturned the l of Tax Appeals' fact determination that the gift was contemplation of death though there was substantial nce to sustain it, as appears from the Court's own nent of the evidence.

This is in conflict with *Hulburd v. Commissioner of nal Revenue,* 296 U. S. 300; *McCaughn v. Real Estate Title & Trust Co.,* 297 U. S. 606; *Elmhurst Cemetery f Joliet v. Commissioner of Internal Revenue,* 300 U. ; *Neal v. Commissioner of Internal Revenue,* 53 F. 306 (Circuit Court of Appeals, Eighth Circuit); *Com- oner of Internal Revenue v. Sharp,* 91 F. (2d) 804 uit Court of Appeals, Third Circuit); which hold that vithout such power.

The question involved as to the meaning of the e in its application to trusts is one of great public tance. If the Circuit Court of Appeals' decision is t and the Supreme Court so finds, large amounts of e otherwise unavailable will be collected by the Gov- nt. The claim generally asserted by the Commis- in the trust cases where income has been withheld beneficiaries until donor's death has been that they ntended to take effect in possession or enjoyment at r death. Such was his first position in this case. His ons, however, in this field have been greatly limited Court's decision in *May v. Heiner, supra.* If the Court of Appeals is correct in this case, many of es heretofore deemed beyond the reach of the stat- taxable. If not, petitioners and the taxpayers of

the Tenth Circuit should not be treated differently from others.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

THE COLORADO NATIONAL BANK OF DENVER
AND GERTRUDE HENDRIE GRANT,
Executors of the Estate of
Edwin B. Hendrie, Deceased.
By MORRISON SHAFROTH,
Attorney for Petitioners.

In the

Supreme Court of the United States

OCTOBER TERM, 1937.

No.................

THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, Deceased, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in this case is reported in *Commissioner of Internal Revenue v. The Colorado National Bank et al.*, No. 1566, 95 F. (2d) 160 (Advance Sheets). This decision, rendered on January 31, 1938, rehearing denied April 4, 1938, is found in the Record on page 53. The memorandum opinion of the Board of Tax Appeals (not reported), entered September 19, 1936, is found at page 28 of the Record.

II.

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Feb-

ruary 13, 1925. The judgment of the United States Circuit Court of Appeals was entered on January 31, 1938. Petition for rehearing was filed on March 1, 1938, and denied on April 4, 1938.

III.

STATEMENT OF THE CASE.

A statement of the case is contained in the petition for a writ of certiorari at page 2.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In reversing the decision of the Board of Tax Appeals and giving judgment for the Commissioner.

(2) In holding that decedent's irrevocable transfer effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

(3) In holding that this irrevocable gift in trust without reservation of income to donor was in contemplation of death as a matter of law under said statute because it withheld from the beneficiaries the actual enjoyment thereof until after donor's death, thereby disclosing an intent to provide for them after his death.

(4) In holding that though the trust was for the purpose of preserving a part of donor's property from the dangers of his future stock market speculation, yet the desire to preserve it was in order to provide with it for his descendants after his death, and that it was therefore as a matter of law in contemplation of death under the said statute.

(5) In overturning the determination of the Board of Tax Appeals that the gift was not in contemplation of death and in holding that such determination was without substantial evidence to support it.

V.

ARGUMENT.

An analysis of the Court's opinion shows that there is no question in this case of any attempt to evade the estate tax; no claim of thought of death immediately or in the near future; no claim of disease or ill health at the time of the gift; and finally neither a two-year presumption nor a finding of the Board of Tax Appeals to aid the tax. On the contrary the Court concedes commendable motive, good health, anticipation of future business activity, lack of thought of death immediately or in the near future, continued life for more than five years after the gift, and a finding of the Board of Tax Appeals that the gift was not in contemplation of death.

Furthermore, it finds that the motive for the gift in trust was the desire to preserve a part of donor's property from the dangers of his future activities in the stock market—"in order to make certain that it would be used for his daughter and her children after his death."* The purpose obviously could not have been attained by a testamentary disposition. It required segregation of the prop-

* "* * * The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for

erty then, not at death, if he was to avoid the effects of his own future speculations.

From this ultimate purpose, however, one of the most common of human motives, it not only infers testamentary disposition and so contemplation of death, but holds that no other inference is possible and that the contrary finding of the Board of Tax Appeals is without substantial evidence to support it.

The same position was taken by the government before the Board of Tax Appeals** and was rejected by it as contrary to the ruling of this Court in *Shukert v. Allen*, 273 U. S. 545; *McCormick v. Burnet*, 283 U. S. 784; *St. Louis Union Trust Co. v. Becker*, 76 F. (2d) 851; affirmed 296 U. S. 48; *Reinecke v. Northern Trust Co.*, 278 U. S. 339; *United States v. Wells*, 283 U. S. 102; and other cases.

In cases of the type here involved—trusts in which the income is withheld from the beneficiaries until donor's death—the Government has usually taken the position that they fall under the second of two statutory categories of gifts (1) in contemplation of death or (2) intended to take

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them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstance is associated with death." (From Opinion of the Circuit Court of Appeals, R. p. 58.)

**" * * The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death." (From Opinion of Board of Tax Appeals, R. p. 30.)

effect in possession or enjoyment at or after death. That was the original position taken by the Commissioner in the pending matter (R. p. 18), but later abandoned. If the Court's ruling in our case, however, is correct, it would seem to follow that most, if not all, trusts intended to take effect in actual enjoyment after death, whether or not within the technical statutory meaning of the possession and enjoyment provision, are in contemplation of death. The motive to provide for the beneficiaries after donor's death is by the very terms of the instruments present in all such cases. That is exactly what all such trust instruments do.

Futile and most costly to the revenue would appear the Government's long and unsuccessful struggle, commencing with *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and concluding with *McCormick v. Burnet*, 283 U. S. 784, and sister cases, to establish that such gifts were taxable under the possession and enjoyment clause, if the simple assertion of liability under the contemplation of death clause would have brought success. Moreover, it would seem unlikely that this Court with the statute and all of the necessary facts before it would repeatedly in that line of cases reject taxability without comment that on the face of the record taxability was patent on the ground of contemplation of death.

The fact is that in each of those cases the Court had before it both provisions appearing in the same sentence of the statute. It had before it the argument that the gift was testamentary because of the postponed enjoyment, and it passed sometimes expressly and sometimes impliedly on the very question involved here.

THE COURT'S RULING AS TO THE CONCLUSIVE EFFECT OF POSTPONED ENJOYMENT UNTIL AFTER DONOR'S DEATH IS CONTRARY TO SHUKERT v. ALLEN, 273 U. S. 545, AND OTHER CASES.

The facts as set forth in the District Court (300 F. 754) and in the decision of the Circuit Court of Appeals (6 F. (2d) 551) show that on May 5, 1921, donor created for the benefit of his three children a trust fund of about two hundred thousand dollars to accumulate for a period of thirty years, subject to slight diminution in case of remote contingencies. He was fifty-seven years of age when the trust was made and died four months later. The District Court found from the donor's own statement that:

> "* * * It is a trust created by Mr. Shukert, which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune, or extravagance, or waste, or things that might happen after that. His care went clear to the time when 30 years should have gone by. His care for his children reached clear to that point, and he intended at that time it should take effect."

The gift was held taxable under the second clause and the ruling was affirmed by the Circuit Court of Appeals (6 F. (2d) 551).

When the case came to the Supreme Court of the United States, *the Government argued* (see outline of Government's argument, 71 L. Ed. 766) that:

> "The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in question is in substance and effect testamentary, because it

postpones the ordinary incidents of ownership until the donor's death, and in fact is, and was intended to be, a postmortem disposition of the property."

MR. JUSTICE HOLMES delivered the unanimous opinion of the United States Supreme Court reversing the lower court and holding the trust not taxable. He discussed its taxability under the contemplation of death clause as well as under the possession and enjoyment clause, though the latter was the point stressed by the Government, and the Court. He said (273 U. S. at 547):

> "* * * It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that, being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute.
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> * * * * * *
>
> "* * * But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

On January 2, 1929, the United States Supreme Court in the case of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, passed on the taxability under the Revenue Act of

1921* of seven trusts created by decedent during his lifetime. By reason of powers of revocation contained in two of the trusts, it was held that those transfers were not complete until decedent's death and on that ground were taxable. In a third, life incomes were given the wife and children with distribution of corpus after donor's death.

> "The other four 1919 trusts were severally made for the benefit of a child of the settlor. As drawn, they provided for the accumulation of the whole income until the period of distribution of the corpus, after the death of the settlor, except so much thereof as the settlor might, from time to time, direct to be paid to the beneficiary named. By amendments made on June 28, 1921, in the manner provided in the trust instruments, the beneficiary under each was to be paid the income." (From Opinion of Circuit Court of Appeals, 24 F. (2d) 91, 92.)

Donor died in 1922.

Here again the Government relied on the possession and enjoyment theory. The Supreme Court, however, had before it trust instruments providing for donor's children after his death. The intent was clear on their face. Under the Court of Appeal's ruling in our case this conclusively showed contemplation of death. Yet, referring to these the Supreme Court said (p. 347):

> "* * * as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to tax."

It seems reasonable to infer that the Court did not consider the intent to provide for his children after his death as shown by the trust instrument to be equivalent to testamentary disposition or contemplation of death.

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*Identical with Revenue Act of 1926 in this contemplation of death provision.

The Court made no distinction between the trust in which the life income was given to the beneficiaries and the four in which it was to accumulate. (The amendment of the four trusts in 1921 probably could not alter the intent of the gift of 1919.) Logically there is no distinction so far as this question is concerned. In each, ultimate provision is made and intended to be made for the beneficiaries after donor's death. And if that intent is to be construed as testamentary and in contemplation of death, then all such gifts are taxable whether the income is to accumulate or to be distributed.

MR. JUSTICE STONE speaking for the Court said (p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute.
>
> "* * * The two sections read together indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment."

In *May v. Heiner*, 281 U. S. 238, donor transferred to trustees certain property, the income to be paid to her husband for life, then to her for life "and after her decease all property in said trust, in whatsoever shape or form

it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees. Words could not make clearer her intent to provide for her children after her death.

Again the Government stressed the second statutory ground, apparently not conceiving success possible on the contemplation of death theory. But again the Supreme Court noted the presence of that problem and said (p. 243):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent."

It then quotes with approval from *Reinecke v. Northern Trust Co., supra,* the passage which we have quoted from that case.

It seems obvious that a case where the income is reserved to donor for life with remainder to her children is much nearer a testamentary disposition than one in which the donor reserves nothing to himself and the income accumulates for the ultimate beneficiaries. Yet the Government repeatedly pressed such cases on the possession and enjoyment theory and when rebuffed in those attempts to tax, both in this and other cases, went to Congress and obtained the Joint Resolution of March 3, 1931.* If the intent to provide for the objects of donor's bounty after his death made the gift testamentary and taxable as in contemplation of death, then the Resolution was wholly unnecessary. It is significant that it sought only to make taxable a transfer under which the decedent reserved the income to himself for life. The fact that it selected that single type of case and did not mention those other cases where the donor reserves nothing

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*See Appendix, page 29.

for himself, but lets the income either accumulate or be paid to the beneficiaries, is evidence that such cases were not intended to be brought within the reach of the statute.

In *Becker v. St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased,* 296 U. S. 48 (decided November 11, 1935), the contemplation of death issue was directly before the Court. Decedent, a man seventy-seven years old, in good health and active in business, executed declarations of trust in favor of each of his four children. The instruments provided for the payment of $300.00 a month out of the income to each child with power on the donor's part to increase or decrease that amount in his discretion; the balance of the income to accumulate and be added to the principal; and the entire trust property to go immediately and absolutely to the child on donor's death. He died seven years later. The value of the trust at that time was $994,195. The district court found that the gift was both in contemplation of death and intended to take effect in possession and enjoyment after death. The Circuit Court of Appeals for the Eighth Circuit reversed the case (76 F. (2d) 851) and found that the purpose of the gift was to make the children independent and to avoid income taxes. The Supreme Court (296 U. S. 48, 52), in holding the gift not taxable, said:

> "We are unable to find anything in the record which conflicts with the statement of the Court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking."

Yet, there was the trust deed with the definite ultimate object that his children should have the property after his death. True, there were other motives—to save income tax and to make his children independent—and so in our case there was the motive to save part of his fortune from loss in the stock market.

Other cases to the same general effect are: *McCormick v. Burnet*, 283 U. S. 784; *Burnet v. Northern Trust Co.*, 283 U. S. 782; *Morseman v. Burnet*, 283 U. S. 783; *White v. Poor*, 296 U. S. 98; *Nichols v. Coolidge*, 274 U. S. 531; *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277; *Welch v. Hassett*, 90 F. (2d) 833 (Circuit Court of Appeals, First Circuit. Affirmed in Supreme Court on a different point. February 28, 1938); *Commissioner of Internal Revenue v. Nevin*, 47 F. (2d) 478 (Circuit Court of Appeals, Third Circuit); *Reinecke v. Northern Trust Co.*, 24 F. (2d) 91 (Circuit Court of Appeals, Seventh Circuit); *Tait v. Safe Deposit & Trust Co.*, 74 F. (2d) 851 (Circuit Court of Appeals, Fourth Circuit); *McCaughn v. Carwill*, 43 F. (2d) 69 (Circuit Court of Appeals, Third Circuit); *Bullard v. Commissioner*, 90 F. (2d) 144 (Circuit Court of Appeals, Seventh Circuit. Reversed on another point. February 28, 1938).

THE RULING THAT THE TRUST WAS CREATED IN CONTEMPLATION OF DEATH IS CONTRARY TO UNITED STATES v. WELLS, 283 U. S. 102.

The Wells case did not involve a trust, but an outright gift made within eight months of death and so presumably in contemplation of death. Donor was seventy-three years old at date of death. Despite the presumption, the poor state of donor's health and his direction that the gifts be treated as advancements, the Court of Claims, where the case originated, found that he was carrying out a policy of liberal gifts to his children during his lifetime and in effect that the gifts were not in contemplation of death. The Supreme Court treated this finding as binding and sustained the lower court. On page 115 the Court uses this language:

> "The phrase 'in contemplation of death' previously found in state statutes, was first used by the Congress in the Revenue Act of (September 8) 1916 imposing an estate tax. It was coupled with

a clause creating a statutory presumption in case of gifts within two years before death * * *. While the interpretation of the phrase has not been uniform, there has been agreement upon certain fundamental considerations. It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern giving rise to a definite motive."

The Court in a note then cites Article 23 of Regula-ns 37 under the Revenue Act of 1918, containing the owing:

"Art. 23. *Nature of Transfer.*—The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. * * * All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death."

Is it not significant that there is no claim in these ny later regulations that it makes any difference, so as the question of contemplation of death is concerned, ther the transfer is immediate to the beneficiary or in t until after the donor's death? If that distinction ted, it would be all-important in every trust case where me was withheld from the beneficiary until donor's h and would have made taxable innumerable trust that remained untaxed.

In our case there was no definite concern connected with death. The definite concern was clearly connected with the stock market. Contemplation of the danger of his speculations, not contemplation of death, was the direct cause of the transfer. No testamentary disposition could have accomplished the desired result. What might therefore be called the proximate cause was fear of the market. The remote cause is immaterial.

Moreover, the fact that the donor also desired to provide for his descendants after his death was a motive that is common to all men. One preserves his property from loss for the same reason that he accumulates his property during life—not primarily or ultimately for himself, but for his wife and children. This is true of men of every age and every state of health. Yet, the Circuit Court of Appeals has held that this motive itself is contemplation of death. It has confused contemplation of death with the expectation of death common to all.

The Supreme Court in the Wells case, referring to the findings of the Court of Claims, says:

> "In the view of the Court as thus explicitly stated not only was there no fear at the time of the transfers that death was near at hand, but the motive for the transfers brought them within the category of those which, as described by the government, are intended by the donor 'to accomplish some purpose desirable to him if he continues to live.' "

THE COURT'S DECISION IS IN CONFLICT WITH COMMISSIONER OF INTERNAL REVENUE v. McCORMICK, ET AL., 43 F. (2d) 277 (CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT).

In this case, Mrs. McCormick, then eighty-three years of age, created a trust of some seven million dollars. The trust provided that the income should cumulate during the grantor's life with minor reservations. After her death

the income was to go to her three children, share and share alike, the principal to be distributed upon the death of the last survivor of said children as each of the children might by will direct. The donor died on July 5, 1923, a few days less than five years after the execution of the trust. The transfer amounted to about one-half of her property.

Considerable evidence was taken as to the state of her health at the time of the execution of the trust. The evidence indicated that she was in good health for one of her age, that she was interested in charities, that she was interested in making certain changes in her home and was interested in the future. No other evidence as to motive than the evidence of the agreement itself and of the general state of her health and interests is referred to in the Board of Tax Appeals' opinion. The Board found that the gift was neither made in contemplation of death nor intended to take effect in possession or enjoyment at or after death.

On September 20, 1930, the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277, reversed the ruling of the Board of Tax Appeals *(McCormick, et al. v. Commissioner of Internal Revenue*, 13 B. T. A. 423) on the ground that the gift was one intended to take effect in possession or enjoyment at or after death, but sustained its ruling that the gift was not in contemplation of death. The Court said:

> "The Board found that the trust was not executed in contemplation of death. There is some evidence tending to support this finding. Petitioner does not challenge its soundness."

The Supreme Court (283 U. S. 783) reversed the Court of Appeals in its holding that the transfer was one intended to take effect in possession or enjoyment at or

after death and reaffirmed the ruling it had made in *May v. Heiner, supra.*

This case is in many respects as identical with the case now pending before the Court as two cases are often found. Mrs. McCormick was eighty-three years old when the trust was made. Mr. Hendrie was eighty. Both were in good health. Mrs. McCormick was interested in her charities and a new house. Mr. Hendrie was interested in business, golf and the stock market. His intent to gamble in the market gave him one definite and powerful incentive for the creation of his trust which Mrs. McCormick lacked; namely, the desire to preserve a part of his fortune if the stock market went against him. Mrs. McCormick died *within* five years. Mr. Hendrie died *after* five years. The trusts in each case provided for the accumulation of the income and for distribution to their children after their deaths. The decisions seem to us in conflict.

THE RULING OF THE CIRCUIT COURT OF APPEALS OVERTURNING THE BOARD OF TAX APPEALS' FACT DETERMINATION IS BEYOND ITS POWER AND IN CONFLICT WITH HULBURD v. COMMISSIONER OF INTERNAL REVENUE, 296 U. S. 300, AND OTHER CASES.

The Court in its opinion recognizes the settled rule that findings of fact by the Board of Tax Appeals will not be disturbed on review, if supported by substantial evidence. We have pointed out that the undisputed evidence presented to the Board showed the sound physical and mental condition of the donor, his interest and activities in life, his intent to speculate in the stock market, his actual speculations for five and one-half years after the gift, his fear of losing his fortune, his desire to segregate a part of his property from the vicissitudes of the market, and his attainment of that object by the creation of this gift in trust—providing for his daughter after his

death. The evidence goes to the very points the Court and regulations have stressed as vital in these cases.

This Court, however, from the single fact that the instrument provides an income for his daughter after his death and was intended so to do, infers, contrary to the finding of the Board, that contemplation of death was the moving cause of the gift. It is difficult for us to see how this inference is possible from the evidence. If it is possible, it certainly is not the only inference possible. In the face of the finding of the Board on this question of fact, the Court had no power to choose between conflicting inferences.

In *Hulburd v. Commissioner of Internal Revenue*, 296 U. S. 300, at 306, it is said:

> "* * * The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the Court was without power to choose between conflicting inferences unless only one was possible, or to try the case de novo. Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732."

In *McCaughn v. Real Estate Land, Title & Trust Co.*, 297 U. S. 606, the District Court, in which the suit originated, found (7 Fed. Supp. 742) that plaintiff had failed to sustain the burden of proof arising from the statutory presumption as to gifts within two years of death and that the gift therefore was taxable as in contemplation of death. The Court of Appeals (79 F. (2d) 606) reversed the case, holding that in the light of the Wells case, supra, the gift was clearly not in contemplation of death. The Supreme Court of the United States in holding the Court of Appeals without power to overturn the ruling of the lower court used this significant language:

> "* * * Where a general verdict is found by the trial court, it has the same effect as the verdict

of a jury. The Appellate Court cannot pass upon the weight of evidence." (Citing many cases.)

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

In *Elmhurst Cemetery Company of Joliet v. Commissioner of Internal Revenue*, 300 U. S. 37, the Supreme Court said (p. 40):

"* * * It is the function of the Board to weigh the evidence and declare the result."

In *Neal v. Commissioner of Internal Revenue*, 53 F. (2d) 806 (Circuit Court of Appeals, Eighth Circuit), the Court says (p. 807):

"Were these gifts made 'in contemplation of death,' as that expression is used in the statute * * *?" (Citing cases.) "This is purely a question of fact. The fact sought is the controlling motive in the mind of Neal in making these gifts * * * and we cannot disturb the determination of the Board thereon if there is substantial evidence to support such determination."

In *Commissioner of Internal Revenue v. Sharp et al.*, 91 F. (2d) 804 (Circuit Court of Appeals, Third Circuit), gifts in trust were involved. The Board of Tax Appeals found (30 B. T. A. 532, at 536):

"* * * He was devoted to his family and wished to provide for them in a way to secure them against any possible disposition which he might develop in old age to hazard his fortune in business deals. * * * His desire was to place funds beyond his own control which would insure the financial protection of his wife and children. This was the primary object of the creation of the trusts and of making the transfers, as he expressed himself to the lawyer who prepared the trust instrument for him."

This case was reopened before the Board to permit the introduction of the trust agreements (33 B. T. A. 290). The Circuit Court of Appeals sustained the finding of the Board that the gift was not in contemplation of death and was not taxable.

CONCLUSION.

For the foregoing reasons it is submitted that a writ of *certiorari* should issue to the Circuit Court of Appeals for the Tenth Circuit.

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APPENDIX.

The Government's claim is based on Section 302 (c) of the Revenue Act of (February 26) 1926, as amended, 26 U. S. C. A., Sec. 411 (c); 44 Stat. 70; March 3, 1931, c. 454, 46 Stat. 1516; June 6, 1932, c. 209, Sec. 803 (a), 47 Stat. 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Joint Resolution of March 3, 1931 (Public No. 131—Seventy-first Congress):

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

" 'To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.' "